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### THE PHOTOGRAPH AS EVIDENCE.

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With the growing knowledge and use of the art of photography, it is not surprising to find that the photograph is becoming an increasingly important evidential factor in modern litigation. The danger, however, of accepting the testimony of the "silent witnesses," as they have been called, has been recognized from practically the earliest instances of their use, and it has been realized that evidence which can be mechanically created by man can, by him, be altered and distorted to suit his own ends. Indeed it was said nearly a decade ago, long before the art had reached its present stage of efficiency and accuracy, that "it is common knowledge that as to such matters, either through want of skill on the part of the artist, or inadequate instruments or materials, or through intentional and skillful manipulation, a photograph may be not only inaccurate but dangerously misleading." The court very properly recognized the fact that the same skill which renders a photograph an accurate representation of a particular fact, may, if directed by an unscrupulous person, be the means of creating an inaccurate but apparently perfect picture, and this with but slight chance of detection.

To one who is familiar with the mysteries of the art, and has spent much time in making pictures or observing others in the process, nothing can be more absurd than the oft-repeated statement that photographs, like figures, cannot lie. Given a skillful operator and a very simple equipment, there is nothing short of the fourth dimension that cannot be made to appear on the finished print. In the early days the courts themselves but served to increase the opportunity for fraudulent work by excluding all photographs unless they were made by professionals, but the more recent decisions have broken away from their predecessors and admitted pictures made by amateurs as well as by professionals. And no reason exists why this should not be done, for certainly many amateurs possess far more skill and ability than is exhibited by numbers of those who are pleased to consider themselves as professionals. Certainly there can be no logical reason for the exclusion of pictures taken by the "camera fiend" who is usually on the spot when anything occurs, and while they may not be so artistically correct as those made by his

professional brother, they are very apt to be equally accurate pictorial representations of the actual conditions, and there is but slight chance of their having been taken from a studied position in order to obtain a predetermined effect. The accuracy of amateur pictures may likewise be increased by a device which has been applied to small cameras so generally in use, which employ films rather than plates. By means of this attachment the date or any bit of information may be written on the margin of the film after it has been exposed, and appears when the film is developed. After the inscription has been written it is impossible to change it, and where it is shown that an amateur is careful and accurate in keeping on each negative a record of its exposure an entry on the margin should speak for itself in adding to the value of the picture as evidence.

Conceding then, the possibility of the fraudulent manipulation of photographs, the question at once arises whether this extends to all pictures taken under all conditions; and with the possible exception of motion picture films, the question must be answered in the affirmative. Indeed it is doubtful whether even these should be excepted as beyond the possibility of alteration, but their peculiar characteristics certainly render the operation more difficult. But with all pictures taken with the ordinary cameras in daily use, whether contact prints or enlargements, the possibilities of alteration, both on the negative and on the print, are almost limitless. In questions of identity, for instance, nothing can be more misleading than a print from an intentionally retouched negative; the expression of the entire countenance may be changed simply by retouching the eyes, the corners of the mouth, and smoothing out or etching in lines on the face. The addition or removal of a moustache is a comparatively simple matter, while the judicious use of the etcher will transform the iron-gray hair of the middle-aged man to the blackness of the proverbial raven. And this is true likewise of photographs designed to show the health and strength of the subject. Shadows can be penciled in or etched out, the face emaciated and wasted from disease or suffering may be made to appear robust and healthy, while one in perfect physical condition may be made to appear worn and drawn. However, even greater and more misleading changes may be made in photographs designed

to show the seriousness of wounds. These are almost universally admitted when offered in evidence unless they violate in some measure the rules of admissibility, but it is a dangerous practice, and one which should not be permitted without due precaution. In the hands of a skillful operator photographs of this nature can, by the use of a little retouching "dope," an etcher, and a hard pencil, easily be altered to augment or diminish the object which they are supposed to portray, or even change its location; and by the ordinary jury, may it not be said, by the court and counsel themselves, the operation can never be detected. The marks of the retouching do not show on the finished print, and can be discovered, except in very obvious instances, only from an examination of the negative itself. Of course, in the case of pictures very much enlarged, the retouching might be made apparent, but if it is, the use of a tube of color and a camel's hair spotting brush will render them invisible again. It should not be supposed that all photographs of this nature offered in evidence are intentionally altered; on the contrary the absence of judicial expression in the decided cases on this point would indicate that the matter has but infrequently engaged the attention of the courts.

Aside from the actual changes that can be made in the negative itself, there exist innumerable methods of "faking" pictures of all descriptions. It is a comparatively simple matter so to combine or take two pictures that the result will be inaccurate enough to satisfy the most unscrupulous litigant, and sufficiently plausible to satisfy the most skeptical jury. In an instance which failed to reach the courts some years ago, a young lady but a few years married sought her attorney in great indignation, producing a picture of her husband with a woman of none too savory reputation, and which the wife believed had been taken on a certain date. The husband, as the lawyer well knew, had not been near the woman but argument and persuasion were unavailing. The lawyer then determined to fight the devil with fire, and obtaining from the wife a recent photograph of herself, he requested her to return with her husband in a few days. When she did so, he showed her a picture of herself, apparently taken with a well-known man-about-town. Needless to say the divorce proceedings were dropped, for what could

either party say in the face of such convincing evidence against himself? And nothing could be simpler than obtaining a picture of this character. By trimming the photographs of the two persons, gluing them side by side, and making a copy of the whole, there could be secured a negative which, when the lines indicating the edges of the copied prints had been removed, and the whole smoothed over with a pencil and etcher, would yield a print which would deceive anyone except an expert. Yet another method of taking fake pictures is rendered possible by a simple little instrument which slips over the lens of the camera, permitting only half of the plate to be exposed at one time. By this means two persons who have never seen each other may be photographed on the same plate, or one person may be taken in different positions. This method, while simple, is of little practical use for producing misleading pictures, since the opportunity for detection is greater unless the negatives are made under just the proper conditions and with a background that lends itself to the purpose. A mode of producing "fake" pictures which is often used is that of printing through two negatives after they have been suitably prepared, the result being a print showing the features from each negative that it is desired to retain. Indeed there are few commercial photographers who do not have in their stock room a carefully selected series of negatives showing cloud effects, and these are used to produce clouds in what would otherwise be the bare sky of landscape pictures. Using the double negative method the writer has "faked" the picture of an aeroplane over a stream several hundred miles away, the whole being an apparently genuine print.

Perhaps one of the most frequent uses of photographs as evidence is in trials involving the validity of written instruments, and when properly made they are of invaluable assistance. In fact, where a document is to be handled to any extent, it is always best to use a copy in order that the original may not be subject to mutilation through wear. For pictures of this nature a slow plate with a rather small stop is by far the best, and sufficient exposure should be given to bring out clearly all the lines of the document. An appropriate orange or yellow

color screen is necessary in order to produce good negatives from some papers, especially blue and violet, and in some instances manila, orange, yellow and a few other tinted papers. Unless the picture is very much magnified, the use of a screen will not interfere with the optical qualities of the lens. An abrasion or the density of the lines on an instrument can sometimes effectually be disclosed by means of a photograph made by transmitted light, that is, with the light shining through an instrument instead of being reflected from its surface. These, however, must usually be magnified before they are of much value. But when properly taken they are invaluable in disclosing water marks, fiber of paper, continuity of strokes or retouching of lines, and all other matters which cannot be observed from a reflected light picture. In certain cases where it is desired to accentuate an unevenness, such as a pencil indentation without color, or an embossed figure, the document may be so placed that the illumination will come from the side of the object. The resultant print will then show the objects in relief. Fraudulent and improper alteration is as possible in the case of photographs of documents as in any other. The negative may be retouched and spotted and the finished print lined. It has been very truly said that the refractive power of the lens, the angle at which the original instrument is inclined to the plate, the accuracy of the focusing, and the skill of the operator, are all to be taken into consideration. By placing the original to be copied obliquely to the sensitive plate that portion of the instrument to be copied which is nearest the plate may be distorted by being enlarged, and the part farthest away may be correspondingly reduced, while the slightest bulging may cause the resulting negative to be blurred. Indeed then, in the matter of taking photographs of this nature, and in the subsequent manipulation of the negative and print, the opportunity for misleading work is exceedingly great. However, the skill required to "doctor" a picture of this kind is such as to render the question of less relative importance. As is said by Mr. Osborn, at page 51 of his work on "Questioned Documents:" "If there is any doubt about the accuracy of photographs they can be made by both parties, and in questioned document cases they can easily be verified by com-

parison with the original paper which is at hand. On account of the latter fact there is not the legitimate objection to photographs of a questioned document that may arise over photographs of a different nature which cannot be compared and verified by judge, jury and opposing counsel."

A correct photographic representation depends much on the position in which the camera is, and the viewpoint from which the exposure is made, especially in pictures of landscapes, the location of crimes and accidents, machinery and the like. As one court has observed, the photographs introduced in evidence by opposing parties sometimes present as great apparent conflict as the testimony of the witnesses. Pictures showing distances are often misleading because of the lack of proper perspective, and do not necessarily present distances and angles correctly. True, this defect can be remedied to some extent by stereoscopic photographs, and it is rather surprising that these have not come into more general use. Certainly they are of much greater value to the jury. Nothing is simpler than to take an incorrect picture of this class. A roadway with a pronounced grade can be made to appear level by taking a side view with the camera inclined at the same angle and to the same degree as the object, and this is only a single instance of the innumerable cases in which the camera may be made to lie. It must be remembered, too, that the ordinary photograph deals only with chiaroscuro, or light and shade, this very fact rendering it an easy matter to produce an incorrect representation. And it may be observed in passing that this is a comparatively recent achievement, for the Egyptian painters made no use of shadows, but saw only outline of form. However, the photographer having the shadows at his command does not hesitate to use them to produce the desired results. A defect in a bit of machinery, a broken rail, a hole in a roadway, can be made to appear matters of little consequence by placing the camera in such a position that they are in the shadow, and do not get the benefit of direct lighting. But should a mistake be made here, all is not lost by any means. If the picture, by some mistake of the operator, shows more than is intended, the negative can easily be reduced with the aid of a few chemicals and a bit of cotton, the resulting

print showing a deep shadow over the part to be concealed. Or should the reverse condition obtain, the negative can be intensified and the detail brought out. These methods are constantly practiced in legitimate work, and the results are certain.

It will be seen, therefore, that all ordinary photographs are of questionable evidential value, except possibly motion picture films. The latter have apparently been but seldom used. In a recent strike in one of the coal fields, motion pictures were taken for trade purposes, and these were subsequently used to identify some of the strikers. But their use must necessarily be limited, because of the fact that only in such instances as this are pictures available, and should they come into more general use it is questionable whether their value would not be greater than photographs taken with ordinary cameras. Owing to the exceedingly small film used, each individual picture being but little over an inch square, it is very difficult, if not impossible, to make any alteration on the film itself that will not show on the screen, although of course the opportunity for making "fake" pictures is even greater with a motion picture machine in the hands of a skilled operator, than with the ordinary type of camera.

The most that can be said then is that too much care cannot be exercised where photographs are introduced as evidence in a case. The prints should be required on glossy paper, since it shows details much more clearly than a matt or studio surface, and if there is the slightest suspicion that the negative has been altered or retouched, it should be called for and examined, that the court and jury may see for themselves that its gelatine surface is unbroken.

—Lyle Repiton Buskey in *Law Notes*.